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IN THE

Supreme Court of the United States

October Term, 1945.
No. 1071

L. E. CARPENTER and MARGARET CARPENTER,
Petitioners,

vs.

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARCHIBALD H. VERNON,
EARL E. JOHNSON,
GILBERT E. HARRIS,
433 South Spring Street, Los Angeles 13, Calif.,
Attorneys for Respondent.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The facts of this case are concisely and adequately set forth in the opinion of the District Court of Appeal of the State of California, filed November 9, 1945 [Record, pp. 34, 35].

Petitioners' suit is brought upon the theory that the trustee under the deed of trust in question violated its duty when it failed to proceed with the sale of the trust property, although the beneficiary had abandoned sale proceedings under the power of sale and invoked his alternative remedy of foreclosure by action.

In the first amended complaint [Record, pp. 14, 15], petitioners alleged that the provisions of the California Code relating to the exercise of powers of sale (Sections 2924 and 2924b, Civil Code) are unconstitutional and deprived petitioners of private property without due process of law because said sections do not provide for notice to the trustors, the petitioners herein.

As no sale was made under the provisions of said sections, they are not involved in the instant proceeding, although petitioners' contention is clearly without merit.

Washington University v. Finch, 85 U. S. 106, 21 L. Ed. 818;

Bell Etc. Mining Co. v. First Nat'l Bank of Butte, 156 U. S. 470, 39 L. Ed. 497.

Brief of the Argument.

I.

The judgment herein did not deprive petitioners of their property without due process of law.

II.

This Court is bound by the decisions of the highest Court of the State of California as to the validity and construction of the contract involved.

III.

The obligation of the contract contained in the deed of trust was not impaired by the alternative and additional remedy of enforcement given by Section 725a of the Code of Civil Procedure of the State of California.

ARGUMENT.

I.

The Judgment Herein Did Not Deprive Petitioners of Their Property Without Due Process of Law.

Petitioners, in their specification of errors, contend that the denial of a rehearing by the District Court of Appeal and of a hearing by the Supreme Court of the State of California deprived them of their property without due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution.

It is well established that the right of appeal or of review is not essential to due process of law where due process was accorded to the litigant in the Court of first instance.

Luckenbach S. S. Co. v. United States, 272 U. S. 533, 71 L. Ed. 394;

Ohio Ex Rel Bryant v. Akron Metropolitan Park District, 281 U. S. 74, 74 L. Ed. 710.

Petitioners were accorded a full hearing in the Court below upon the contentions set forth in the original complaint [Record, pp. 1 to 4], and in the First Amended Complaint [Record, 8 to 24, 31].

The facts were so fully set out that the Court of first instance, applying the well established law of the State of California, determined that the petitioners had not stated and could not state a cause of action against respondent.

Petitioners appealed, as was their right, and the District Court of Appeal affirmed the judgment rendered by the

Court of first instance. They were thus accorded due process of law, and were deprived of no constitutional right or guarantee by reason of the denial of a rehearing by the District Court of Appeal and a denial of a hearing by the Supreme Court of the State of California.

II.

This Court Is Bound by the Decisions of the Highest Court of the State of California as to the Validity and Construction of the Contract Involved.

The deed of trust in question was a contract made by residents of the State of California, affecting real estate situated in the State of California and to be performed in the State of California. It is well established that this Court has no jurisdiction to review the decision of the highest Court of the State on the question of the validity or construction of a contract.

Selover, Bates & Co. v. Walsh, 226 U. S. 112, 57 L. Ed. 146;

Atlantic Coast Lumber Corporation v. Minshew, 235 U. S. 685, 59 L. Ed. 424;

Tidal Oil Company v. Flanagan, 263 U. S. 444, 68 L. Ed. 382;

Guaranty Trust Company v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

Petitioners, the trustors under the deed of trust, have no right to control or direct the enforcement of the deed of trust by the owner of the obligation secured.

Scott v. Security Title Insurance and Guarantee Co., 9 Cal. (2d) 606, 72 Pac. (2d) 143.

The trustee is not an interested party in a foreclosure action brought by the beneficiary to foreclose a deed of trust, and has no interest in such action.

Field v. Acres, 9 Cal. (2d) 110, 69 Pac. (2d) 422.

III.

The Obligation of the Contract Contained in the Deed of Trust Was Not Impaired by the Alternative and Additional Remedy of Enforcement Given by Section 725a of the Code of Civil Procedure of the State of California.

That the right to foreclose a deed of trust as a mortgage, given by Section 725a of the Code of Civil Procedure of the State of California, did not alter the contract, but merely afforded a new and additional means of enforcing an existing right, and hence is not unconstitutional as to deeds of trust antedating its adoption, was held by the Supreme Court of the State of California in *Lincoln v. Superior Court,* 2 Cal. (2d) 127.

The doctrine of election of remedies does not apply to the remedies for the foreclosure of a deed of trust as the remedies of foreclosure by trustee's sale under the power of sale therein and foreclosure by action as a mortgage are not inconsistent, but are alternative, cumulative remedies for the enforcement of the contract.

Flack v. Boland, 11 Cal. (2d) 103;

McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231;

Commercial Centre Realty Co. v. Superior Court, 7 Cal. (2d) 121.

That an additional remedy for the enforcement of an obligation does not impair the obligation of the contract and is not unconstitutional, has been repeatedly held by this Court.

Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163;

New Orleans & Lake Railroad Company v. State of Louisiana, 157 U. S. 219, 39 L. Ed. 679;

Guaranty Trust Company v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

Petitioners' contract right under the deed of trust was to have the real estate conveyed to the trustee reconveyed to them when they had satisfied the obligation secured by the deed of trust. Section 725a does not affect or impair this right.

Respondent submits that no federal question of substance is presented by the petition herein, and that such petition should be denied.

Respectfully submitted,

ARCHIBALD H. VERNON,
EARL E. JOHNSON,
GILBERT E. HARRIS,
By ARCHIBALD H. VERNON,
Attorneys for Respondent.